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No. 90-1146

In The

Supreme Court of the United States

October Term, 1990

FMC, a Delaware Corporation,

Petitioner,

v.

SHOSHONE-BANNOCK TRIBES, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Shoshone-Bannock Tribes under the *Montana v. United States* test have civil jurisdiction over a nonIndian corporation which voluntarily entered into numerous consensual relationships with the Tribes and is located on fee land within the Tribes' reservation.

2. Should the federal courts give deference to tribal court fact finding when such tribunals are charged in the first instance to develop the factual record, evaluate and determine the federal question of tribal jurisdiction.

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BRIEF IN OPPOSITION

The Respondents Shoshone-Bannock Tribes, et al., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. The opinion is reported at 905 F.2d 1311 (9th Cir. 1990).

STATEMENT OF THE CASE

Respondents Shoshone-Bannock Tribes, collectively, are a federally recognized Indian tribe, which reside on

the Fort Hall Indian Reservation. Pet. App. 2. The present Reservation encompasses approximately 543,932 acres or 870 square miles. Pet. App. 2. Of the 543,932 acres, 96 percent of the land is Tribal land or held in trust by the United States for the benefit of the Tribes or its individual members. Pet. App. 2. The remaining 4 percent is held in fee by individual Tribal members and nonIndians.

In 1949, FMC (Petitioner) entered the Fort Hall Reservation for the purpose of mining the Tribes' natural resources and processing those resources on the Reservation. Petitioner built a phosphate processing facility on approximately 1,046 acres of the 4 percent of fee land within the Reservation. In 1952, Petitioner executed leases with the Tribes and individual Indians to exploit the nonrenewable phosphorus ore resource located within the Reservation. Pet. App. 3. The Petitioner's facility processes 100% of all the phosphate ore obtained from the Tribal and individual Indian owned lands. Pet. App. 3. The phosphate constitutes over 90% of the minerals used at the Petitioner's processing facility. Pet. App. 3.

Petitioner is and has always been the largest employer on the Reservation, employing 600 individuals. Pet. App. 3. In 1980, Petitioner employed 4 Indians, 0.0007% of the total 600 employees. In 1980, the Tribal unemployment rate was between 50-60%.

Pursuant to the Shoshone-Bannock Tribes' Constitution, chartered under the Indian Reorganization Act of 1934, 25 U.S.C. § 477, the governing body of the Tribes adopted a Tribal Employment Rights Ordinance (TERO) requiring that employers located on the Reservation to

give preference in employment, contracting, and subcontracting to Indians. Tribal Employment Rights Ordinance, EMPT-80-54, July 14, 1980. Pet. App. 3. The Secretary of the Interior approved the Ordinance on October 14, 1980. Pet. App. 3.

The Tribes notified Petitioner that the Tribes had enacted a TERO and that Petitioner would be required to comply with its provisions. Under Section 4.3 of the TERO, the TERO Commission may enter into a written agreement or compliance plan (TERO Agreement) with each employer to "facilitate the implementation of the hiring preference requirement." Pet. App. 69-70.

In 1981, Petitioner and the Tribes negotiated and entered into a TERO Agreement. Under the TERO Agreement, Petitioner agreed to give the TERO office an opportunity to fill all job vacancies at Petitioner's facility. If TERO was unable to fill the position within three days, then Petitioner offered the position to nonIndians. The TERO Agreement also required Petitioner to give qualified Tribally owned or Indian owned businesses preference on contracts and subcontracts, provide training positions, and notify the TERO office of suspensions and terminations of Indian employees. Petitioner complied with the TERO Agreement during 1981-1987, and continually acknowledged in writing that it was subject to the Tribes' jurisdiction.

In late 1986, the Tribes became aware that Petitioner was out of compliance with the TERO Agreement. Following several meetings with Petitioner, it became apparent that Petitioner would not correct its violations. On January 7, 1987, the Tribes wrote to Petitioner informing

it that the TERO Agreement was cancelled and that Petitioner would be required to comply with specific terms of the TERO. Eventually, the Tribes filed civil complaints against the Petitioner in Tribal court for its failure to comply with the TERO. The Petitioner filed in the federal district court challenging the Tribes' jurisdiction.

ARGUMENT

I. THE NINTH CIRCUIT FAITHFULLY APPLIED THIS COURT'S CONSENSUAL RELATIONSHIP TEST ESTABLISHED IN *MONTANA v. UNITED STATES*

In *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), this Court established a two prong test when Indian tribes retain the inherent sovereign authority to exercise "some forms of civil jurisdiction over nonIndians on their reservation." *Montana*, 450 U.S. at 565. The Court stated:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealings, contracts, leases or other arrangements . . . A tribe may also retain inherent power to exercise civil authority over the conduct of nonIndians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe . . .

450 U.S. at 564-65 (citations omitted). Most recently, the Court reaffirmed the *Montana* test in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S.

___, 109 S. Ct. 2994 (1989). The *Brendale* plurality opinion did not analyze the consensual relationship factor set forth in *Montana* because the parties agreed the factor was inapplicable to the particular facts of the case. *Brendale*, 109 S. Ct. at 3007. The Court simply applied the direct effect factor of *Montana* to the specific facts before the Court.

The Ninth Circuit's approach of applying the *Montana* test to the particular facts is precisely the approach required by this Court. The Ninth Circuit narrowly set forth the legal issue as a challenge to the Tribe's power to enforce the Tribal Employment Rights Ordinance upon a nonIndian business operating on fee land within the Reservation. Given the particular facts, the Ninth Circuit reached "only the first *Montana* factor". Pet. App. 7. The Court found,

> FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly on fee and not on Tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money involved.

Pet. 9.

These conclusions of the Ninth Circuit were compelled by the facts. The Ninth Circuit correctly found pursuant to *Montana* that there were well established "commercial dealings" between the tribes and its individual members and the Petitioner over the royalties for the phosphorus ore mined on the Reservation. Additionally, the Petitioner obtained permission to enter the Reservation through leases and rights-of-way. The Petitioner also voluntarily entered into a settlement contract or arrangement which recognized the regulatory taxing authority of the Tribes, and the employment of Tribal members. Finally, the Petitioner consented to giving preference to qualified Tribal members under the executed TERO Agreement.

Contrary to Petitioner's assertion, the Ninth Circuit did not indulge in an overbroad interpretation of the *Montana* decision. Instead, the Court undertook a narrow approach of reviewing the specific facts of the case and applying the *Montana* test to the facts. The numerous facts establishing a consensual relationship cannot and does not result in an overbroad interpretation of this Court's established principles.

The Petitioner claims the Ninth Circuit "expressly rejected any requirement that Tribal regulation based on a consensual relationship must bear some nexus to the consensual relationship in question." Pet. 8, 12. However, there is no nexus requirement. *Cardin v. DeLaCruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

Assuming *arguendo* that there is a nexus requirement, the court addressed the nexus requirement by stating, "FMC is correct that at some point the commercial relationship becomes so attentuated or stale the *Montana's*

consensual relationship requirement would not be met . . . The relationship here, however, is close enough to support the regulation." Pet. App. 9. Thus, the Court considered the nexus argument, and found that the Petitioner's close consensual commercial dealings with the Tribes and its resources, and the regulatory authority agreements relating directly to the employment practices at the Petitioner's facility processing the Tribes' resources met any nexus requirement. The nexus between Tribal regulation and the consensual relationship here is significantly enhanced by three additional factors: (1) the same parties were involved in the several agreements, leases, and commercial dealings; (2) the ore which is extracted from the Tribal mine is the same ore that is processed at the facility; and (3) all of these activities took place within the same Reservation. Indeed, the exploitation of the Tribes' non-renewable resources is sufficient in itself to meet any consensual relationship. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). This Court made clear in *Merrion*, that once a nonmember enters the reservation and conducts business with the tribe, a tribe has authority to regulate: "there is a significant territorial component to tribal power." 455 U.S. at 142.

Petitioner relies upon *Duro v. Reina*, ___ U.S. ___, 110 S. Ct. 2053 (1990), a criminal case, to argue that this Court "has been careful to limit tribal jurisdiction over nonIndians . . . " Pet. 12. Significantly, Petitioner misconstrues the Court's language which recognizes that tribal *criminal* jurisdiction is more limited than tribal *civil* jurisdiction,

> "[i]t is true that our decisions recognize broader retained tribal powers outside the criminal context. (citations omitted) . . . As distinct from

> criminal prosecution, civil authority typically involves . . . consensual relationships with the tribes or its members through commercial dealings, contracts, leases, or other arrangements. *Montana v. United States, supra,* 450 U.S. at 565, 101 S. Ct. at 1258.

Duro v. Reina, ___ U.S. ___, 110 S. Ct. at 2061. Petitioner's quoted language of *Duro* has no relevancy to this civil regulatory case.

Petitioner also asserts that the Ninth Circuit's interpretation of the consensual relationship is "contrary to the decisions of this Court and other lower courts." Pet. 8. The Petitioner cites no authority of this Court or the lower courts in support of this proposition. Indeed, this Court has never applied the consensual relationship test enunciated in *Montana.* Moreover, the well reasoned decision of the Ninth Circuit makes it unnecessary for the Court to do so in this case.

According to the Petitioner, the Ninth Circuit's decision erects a substantial obstacle to economic development on the Reservation because nonIndian landowners "must carefully eschew any commercial dealings whatsoever with either a tribe or its members to avoid becoming subject to across the board regulation . . . " Pet. 8-9. Petitioner offers no evidence for its conclusion that federal policies and the TERO have and will serve as a barrier to economic development. The TERO was adopted to address the high unemployment on the Reservation, and to thereby strengthen the Reservation. The TERO has created jobs and lessened the economic burden of the Tribes.

Moreover, the Petitioner's economic development argument has not deterred Congress or this Court from adherring to federal policy of treating tribal economic development and self-sufficiency as common goals. "[A] principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments." The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) (1988). See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)). In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), the Court discussed a number of statutes Congress enacted to promote tribal government. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court noted that the federal policy of Indian self-government includes the overriding goal of encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216. The Court further states, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenue and provide employment for their members." *Cabazon*, 480 U.S. at 219.

The TERO is consistent with the federal Indian policy of promoting tribal self-sufficiency. The federal Indian preference policy was upheld by this court in *Morton v. Mancari*, 417 U.S. 535 (1974). A unanimous Court held that the Indian preferences contained in Section 12 of the Indian Reorganization Act of 1934, 25 U.S.C. § 472 were not repealed by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e *et seq.*, which proscribed racial discrimination in employment. *Mancari*, 417 U.S. at 547. This Court recognized the objective of Indian preference as being the establishment of "machinery whereby Indian

tribes would be able to assume a greater degree of self-government, both politically and economically." 417 U.S. at 542 (footnote omitted).

The TERO enacted pursuant to the Tribes' inherent authority is a continuation of the federal Indian preference laws. TERO laws have the same objective of the federal preference laws, that is increasing Indian employment, promoting Indian enterprises, and strengthening tribal governments.[1] The result of such laws directly assists tribes in developing economic self-sufficiency, and leadership skills in Indians. The Tribes' interest in enacting an Indian preference ordinance obviously parallels the federal interest. Contrary to the petitioner's proposition, the Ninth Circuit decision will (and has) bolster the economic development of Indian reservations throughout the country.

Petitioner contends that the TERO law is a "100% Indian set aside" for employment and contracting. This assertion is totally misleading and wrong. The TERO merely establishes "the *goal* of 100% Indian employment"

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[1] The Equal Employment Opportunity Commission, Department of Housing and Urban Development, and the Department of Health and Human Services provide financial assistance for the establishment and maintenance of TERO programs. The Department of Labor through the Office of Federal Contract Compliance Programs, participated in a project to assist tribes in establishing TERO offices. The Secretary of the Interior has approved tribal ordinances, including the Shoshone-Bannock Tribes' TERO, establishing and regulating employment activities involved here.

for hiring and contracting within the Reservation boundaries. Pet. App. 70, 71. The Tribal governing body, however, recognized that this goal is not always practical and possible given the labor force and particular employer. Accordingly, the TERO provides for flexible compliance plans which the Petitioner negotiated and entered into with the Tribes. Indeed, the 1981 TERO Agreement is void of any percentages or numbers of Indians to be employed at the Petitioner's facility. Moreover, according to Petitioner, "[t]he employment agreement did not require 'preference' with regard to employment, but instead required only that FMC consider qualified Shoshone-Bannock Indian applicants in hiring." Pet. 5. The TERO is far from a mandatory "set aside" law.

The Tribal ordinance does not impose any "discriminatory burdens" or has a "discriminatory nature". Petitioner's argument otherwise is simply wrong.[2] The test is whether the Ordinance is facially discriminatory. If there

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[2] The Tribes' TERO treats members and nonIndians alike. TERO applies to all employers or persons doing business on or near the Fort Hall Reservation. Indeed, employer is defined as " . . . any person, company, contractor, subcontractor, or other entity located on or engaged in work while on the Reservation, employing five or more persons. The term 'employer' excludes federal, state and county governmental agencies, but includes tribal agencies and contractors and subcontractors of all governmental agencies." Pet. App. 63.

No distinction is made between nonIndian employers and Indian employers. The neutral application of the TERO is illustrated by the Tribes' execution of compliance agreements under TERO with eight nonIndian employers, and six Indian employers.

is a discriminatory application of the TERO, then Petitioner should allege a violation of the equal protection clause of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1990). Petitioner never alleged there was any equal protection violation until it reached the Ninth Circuit. Because the issue was not raised and preserved by the Petitioner in the Courts below, the Ninth Circuit correctly remanded to the Tribal Court to give the Petitioner an opportunity to challenge the application of the TERO under the Indian Civil Rights Act. Pet. App. 10. Petitioner, however, has chosen instead to pursue the issue before this Court. This Court based on well established precedent should disregard such late Constitutional challenges.

Finally, the Petitioner has complained to this Court that it has no representation in the political process of the Tribal government, and based on that reason, this Court should grant its petition. The Court should not engage in legislative solutions, but should leave such remedies to be shaped by Congress. It is well settled that the Congress has plenary power in Indian affairs. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). Moreover, nonIndians have representatives in Congress and Indian tribes do not. With direct representation, nonIndians can protect themselves in ways that Tribes cannot. Indeed, when Congress has seen fit to step in, it has done so. See the Indian Gaming Regulatory Act of 1988, *supra*. The Petitioner's remedy is in Congress, and its suggestion that the Court engage in such policy making should be rejected.

The Ninth Circuit's decision holding that the Shoshone-Bannock Tribes possess regulatory authority over

an established corporation doing business on the Reservation for over 40 years is reasonable and valid. The established consensual relationship between Petitioner and a sovereign is a valid exercise of jurisdiction. The Court should decline the invitation of the Petitioner to grant certiorari.

II. THE ARTICLE III CONSTITUTIONAL QUESTION PRESENTED IN THE PETITION IS FRIVOLOUS

A. The Constitutional Issue Was Not Raised Or Involved In The Decision Below

Petitioner presents the question of whether nonIndian litigants are entitled pursuant to Article III of the Constitution to *de novo* federal judicial review of a tribal court decision determining tribal jurisdiction. The Petitioner did not give the Ninth Circuit the opportunity to hear or decide this question. Indeed, the Petitioner has never presented that question to any of the lower courts. Rather, it chose to sleep on this issue for several years. Now, without any legal basis, the Petitioner asks this Court to review the issue and overturn the decision of the Ninth Circuit.

The Court has rejected such premature petitions because they border on frivolousness or seek advisory opinions. As stated, "[t]his Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals is not properly before us). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *United States v. Santana*, 427 U.S. 38, 41 n. (1976); *United States v.*

Ortiz, 422 U.S. 891, 898 (1975). Denial of the petition is particularly appropriate given the constitutional issue. Ordinarily, this Court will avoid decisions on constitutional issues if a case may be resolved on other grounds. The petition should be denied at least as to this question.

B. Federal Court Deference To The Factual Findings Of Tribal Courts Is Consistent With The Well Established Principles Of This Court

The Ninth Circuit established a deferential, clearly erroneous standard of review of factual findings of tribal courts. Petitioner's broad argument otherwise, is simply wrong. This Court has confirmed that the questions of tribal jurisdiction should be determined in the first instance by the tribal court. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Ninth Circuit relied specifically upon the *National Farmers Union* language establishing exhaustion of tribal remedies which,

> allow[s] a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . [It also will] encourage tribal courts to explain to the parties the basis for accepting jurisdiction, and will provide other courts with the benefit of their expertise in such matters in the event of further review.

National Farmers Union, 471 U.S. 856-57. Pet. App. 5. The Ninth Circuit result is consistent with the exhaustion doctrine announced by the Court, and the important federal policy of supporting tribal courts.

Petitioner overstates the deference given to tribal court decisions by the Ninth Circuit. The Ninth Circuit, following this Court's lead, limited the clearly erroneous standard to only fact finding. Pet. App. 6. On legal issues of tribal jurisdiction, the Ninth Circuit found that *de novo* review was appropriate. Pet. App. 6. The significant legal question of tribal jurisdiction over nonIndians is thus left to the federal courts. Certainly, if a federal court determines that tribes lack jurisdiction under federal law over nonIndians, the Tribes would adhere to the decision. The Petitioner's speculation otherwise is untenable.

Petitioner argues that a non-Article III tribal court's findings of fact are subject to *de novo* review by the federal courts. Petitioner's proposition is based on the exception, rather than the general rule of established law which permits agencies to hear and determine federal claims. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In only two circumstances, does clear federal law require facts to be found *de novo* by an Article III court: (1) deportation of an individual who seeks to prove citizenship, *Ng Fung Ho v. White*, 259 U.S. 276 (1922), and (2) a traditional state common law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 92 (1982) (Burger, C.J., dissenting). This particular case does not fall within the two specific exceptions of deportation and bankruptcy. The decision below was a pure and simple case of tribal jurisdiction, a federal question.

Petitioner relies upon *Crowell v. Benson*, 285 U.S. 22 (1932), to support its *de novo* review of facting finding argument. The *Crowell* case required *de novo* review of the question whether an injury occurred upon the navigable waters of the United States when workmen's compensation was sought under the Longshoreman's and Harbor Workers' Act. The holding was quite narrow and has never been expanded. This Court has recently noted:

> "*Crowell's* precise holding, with respect to the review of 'jurisdictional' and 'constitutional' facts that arise within the ordinary administrative proceedings, has been undermined in later cases . . . But the general principle of *Crowell* – distinguishing between congressionally created rights and constitutionally recognized rights – remains valid . . . " *Northern Pipeline Co.*, 458 U.S. 50, 82, n. 34 (1982).

Moreover, as early as 1946, Justice Frankfurter stated, "one had supposed that the doctrine had earned a deserved repose." *Estep v. United States*, 327 U.S. 114, 142 (1946). *Crowell* has thus been undermined by the subsequent decisions of this Court. Accordingly, *Crowell* is not controlling to require *de novo* review of findings of fact of a tribal court created by a sovereign tribal government.

CONCLUSION

In light of the Ninth Circuit's strict application of the *Montana* consensual relationship factor to the unique facts of this case, there is no substance to Petitioner's request that certiorari be granted in this matter. Additionally, the presentation of the constitutional issue to this Court is

inappropriate. Respondents pray that Petitioner's Writ Of Certiorari be summarily denied.

Respectfully submitted,

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